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Supreme Court of the United States

OCTOBER TERM, 1949
No. 485

ROSE W. SHAIN,

Petitioner,

against

MARK SHAIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI

ARCHIBALD PALMER
Attorney for Petitioner
320 Broadway
New York, N. Y.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of ROSE W. SHAIN prays that a writ of certiorari issue to review the decree of the Supreme Judicial Court of the Commonwealth of Massachusetts, entered on the 19th day of September, 1949, affirming the decree of the Probate Court of the Commonwealth of Massachusetts, County of Norfolk, sustaining the respondent's plea to the jurisdiction and dismissing the petition of the petitioner herein for a separate support.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported in the Advance Sheets of the Opinions of the Supreme Judicial Court of the Commonwealth of Massachusetts (1949), 923-26.

The opinion of the Probate Court is contained in a report of the material facts at R. 8-24.

JURISDICTION

The decree of the Supreme Court of the Commonwealth of Massachusetts, the highest court of that State in which a decision could be had, was entered on the 19th day of September, 1949.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended, Title 28 U. S. Code, Section 1257 (3).

STATEMENT OF FACTS

The petitioner herein originally brought a petition for separate support in the Probate Court of the County of Suffolk on December 19, 1931, seeking support for herself and her minor children (R. pp. 1, 2). The respondent herein filed a plea to the jurisdiction, alleging that the Probate Court of the County of Suffolk was without jurisdiction in the matter, on the ground that neither party was a resident of the County (R. p. 2). Upon motion of the petitioner herein, the case was transferred to Norfolk County (R. p. 3). The respondent herein, after a period of ten years, amended his plea to the jurisdiction, alleging that on the 12th day of August, 1941, he obtained a divorce from the petitioner herein in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, and consequently any decrees issued by the Probate Court of the County of Norfolk upon the petition for separate support

would be of no effect and that the court was without jurisdiction over the respondent herein.

The respondent herein also filed a petition to dismiss, which petition, as finally amended, alleged that the petitioner herein was guilty of laches for failure to prosecute diligently (R. pp. 6, 7).

The Probate Court, after hearing the evidence on the plea to the jurisdiction and the petition to dismiss, entered a decree denying the petition to dismiss and sustaining the plea to the jurisdiction, and decreed that the petition for separate support be dismissed (R. p. 52).

The Probate Court made a report of the material facts, in which the court found that the petition for separate support was filed on December 19, 1931, that no action was taken thereon until 1946 other than the issuance of an injunction in Suffolk Probate Court in June 1938, restraining the respondent herein from prosecuting a suit for divorce in Florida, which injunction was dissolved in December 1938, and the case transferred to Norfolk County Probate Court (R. pp. 8, 9).

The court found that the plea to the jurisdiction, as amended, was based on a decree of divorce obtained (ex-parte) by the respondent herein in the Second Judicial District Court of the State of Nevada for the County of Washoe. The Nevada decree was granted "after personal service" was made on the petitioner on July 10, 1941, by delivering to her in hand in Massachusetts a certified copy of the Nevada summons, and that the petitioner did not appear or participate in the Nevada proceedings (R. p. 10).

The respondent herein is a member of the Massachusetts bar and has professional cards and letterheads which read: "Member of the Massachusetts bar, permanent address Reno, Nevada". Since before 1931, the respondent herein has maintained a listing in the Boston telephone book, wherein his address is listed as 178 Lincoln Street, Boston, Mass. (R. p. 10).

The respondent herein left Boston during the summer of 1931 and went to New York City, where he established a domicile and where he lived until 1938 (R. p. 10). While in New York the respondent herein obtained a Mexican divorce on October 5, 1931. Neither the respondent nor petitioner herein were ever domiciled in Mexico, and there was no contention that the Mexican divorce was valid (R. p. 11). The respondent herein left New York City early in the year 1938 because of ill health and established a residence in Florida until September 1940. While living in Florida, the respondent herein filed a petition for divorce, and on motion of the respondent these proceedings were dismissed on July 30, 1941 without hearing on the merits (R. p. 11).

The respondent left Florida and went to Reno with, as the court found, the intention of establishing a domicile in that state to restore himself to good health; to "get liberated from an unfortunate marriage"; and to "find peace". He arrived in Reno on September 6, 1940 and resided at the Parkway Hotel until November 1, 1940 (R. p. 12).

He left Reno on November 1, 1940 at the suggestion of physicians to consult with doctors at San Francisco and at the time he left, he left two trunks and two suitcases at the Parkway Hotel.

He left San Francisco on November 10, 1940, stopped at Reno on November 11, and arrived in Los Angeles on November 12 where he remained until January 12, 1941. The winter seasons at Reno were too cold for the respondent herein (R. p. 13). He went to Las Vegas, Nevada on January 13, 1941, remained a few days, then returned to Los Angeles where he remained until March 8, 1941 (R. p. 13).

On March 8, 1941 he returned to Reno, stopping for one day and then proceeded to Cuba where he stayed until April 23, 1941 (R. p. 13). He then went to Miami Beach, Florida, and remained there until May 30, 1941. On May 30, 1941 he returned to Cuba where he remained until June 10 and returned to Miami Beach, Florida, where he stayed until June 13, 1941 (R. p. 13).

On June 15, 1941 he left Miami Beach, Florida and arrived in Reno, Nevada on June 18, 1941, living at the Parkway Hotel until June 21, 1941, at which time he moved into the Ridgeway Apartments where he resided from June 21 to October 21, 1941 (R. p. 14).

The respondent herein filed his complaint for divorce in Reno on July 2, 1941 and the decree of divorce was entered on August 12, 1941 (R. pp. 23, 24). The cause for divorce alleged in the Nevada complaint was that the parties had lived separate and apart for three consecutive years immediately preceding the commencement of the action.

The respondent herein wrote three letters, one to his son, one to his wife, and one to his daughter, which the court reported as facts considered by the court in arriving

at its decision, which letters were marked as Exhibits 57B, 2A and 3A (R. pp. 19-22).

Exhibit 57B was a letter addressed to his son dated January 29, 1941, in which respondent herein stated that if his condition improved he would take his son with him and settle either in Florida or California because he was not permitted to live in a cold climate (R. p. 19).

Exhibit 2A was a letter dated May 27, 1941, written to the petitioner herein in which he stated the reason he was seeking a new divorce was that he had been advised that there was some question as to whether his Mexican divorce would be considered valid in Massachusetts, and that he did desire to reside in Boston some day. He also suggested that if the petitioner herein preferred, she might file divorce proceedings in Boston or she might permit the respondent herein to obtain one in Florida or elsewhere (R. pp. 20, 21). In a postscript to this letter he stated that he would probably leave Florida for California or some other place (R. p. 22).

Exhibit 3A was a letter dated June 12, 1941, less than a week before the respondent herein left Florida for Reno, Nevada, in which letter he states that the status between the petitioner herein and himself is such that he cannot return to Boston without risking a complete collapse, and that only when the settlement has been effected, which means a divorce, will his health warrant his ultimate return to Boston (R. p. 22). In a postscript to this letter he states that he had received a reply to his letter of May 27, 1941 to the petitioner herein and that there remains nothing more to say.

The Probate Court found that while the absence of the respondent herein from Reno between November 1, 1940 and June 18, 1941 might have been suspicious, nevertheless, respondent's absence from Reno during that period was expedient and that he intended to return to Reno without delay, and found that the respondent herein had never given up his Reno residence which was established on September 6, 1940, and that on July 2, 1941 he was a bona fide resident of Reno and that the Reno divorce was valid (R. pp. 23, 24).

On or about the 13th day of August 1948, petitioner herein appealed from the said decree of the Probate Court, dated July 27, 1948, to the Supreme Judicial Court of the Commonwealth of Massachusetts. The Supreme Court found that the divorce obtained by the respondent herein in Reno, Nevada, was valid since respondent herein had established his domicile in Nevada nearly ten months before he filed his divorce suit and that therefore the courts of Nevada acquired jurisdiction to grant the divorce. The Supreme Court of the Commonwealth of Massachusetts also found that according to Sec. 6405 of the Nevada Compiled Laws (1929) respondent herein had not lost his domicile in Reno through his absence from the State of Nevada between November 1, 1940 and June 18, 1941, since the respondent herein was compelled to leave Nevada for reasons of health, and had the intention of returning to Nevada, and therefore, the time of said absence should not be considered in determining the fact of residence, pursuant to Section 6405 of the Nevada Compiled Laws of 1929.

SUMMARY OF STATUTES INVOLVED

Article IV, Section 1, of the Constitution of the United States:

"Full faith and credit.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Amendment XIV, Section 1, to the Constitution of the United States:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Massachusetts Statute

G. L. (Ter. Ed.) c. 208, s. 39 is as follows:

"S. 39. A divorce decreed in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both the parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause

which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth."

Nevada Compiled Laws of 1929

Sec. 6405 *"Legal Residence Defined — Proviso*

"The legal residence of a person with reference to his or her right of suffrage, eligibility to office, right of naturalization, right to maintain or defend any suit at law or in equity, or any other right dependent on residence is that place where he or she shall have been actually, physically and corporeally present within the state or county, as the case may be, during all of the period for which residence is claimed by him or her; provided, however, should any person absent himself from the jurisdiction of his residence with the intention in good faith to return without delay and continue his residence, the time of such absence shall not be considered in determining the fact of such residence."

Section 9460 *"Six Weeks Residence — Causes for Divorce*

"Divorce from the bonds of matrimony may be obtained by complaint, under oath, to the district court of any county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, or in which the parties last cohabited, or if plaintiff shall have resided six weeks in the state before suit be brought, for the following cause, or any other causes provided by law:"

(The causes are (1) impotency, (2) adultery, (3) desertion, (4) conviction of felony, (5) drunkenness, (6) cruelty, (7) neglect to provide and (8) insanity.) (Effective May 1, 1931.)

SPECIFICATIONS OF ERRORS TO BE ADVANCED

The Courts below erred:

1. In upholding a Nevada decree obtained without compliance with the minimum jurisdictional requirements of the State of Nevada.

2. In according full faith and credit to a Nevada decree obtained in violation of procedural due process.

3. In finding that the respondent herein had acquired a bona fide domicile in Reno, Nevada.

4. In finding that the Nevada Court had obtained jurisdiction to grant the divorce in spite of the fact that the respondent herein had not even complied with the minimum jurisdiction requirements, to wit, a residence of six weeks in the State of Nevada before starting a divorce suit.

5. In considering respondent's prior residence and his absence from the State of Nevada in determining the fact of such residence.

6. In declaring the Reno divorce valid in spite of the fact that no personal service was made on the petitioner herein and that she had never appeared in the Nevada action.

REASONS FOR GRANTING THE WRIT

The state courts below have decided the federal question of substance, raised by the plea of the respondent herein to the jurisdiction of the Massachusetts courts in reliance upon the Nevada decree of divorce (R. pp. 3, 4), in a way that deprived the appellant of due process of law. The substantial federal questions involved are:

1. Should the Supreme Court reconsider the rule laid down by that court in the case of *Williams* v. *North Carolina,* 325 U. S. 226, 65 S. Ct. 1092, and return to the rule laid down in *Haddock* v. *Haddock,* 201 U. S. 562, 26 S. Ct. 525?

2. Is a divorce decree obtained in a state where the plaintiff is not legally domiciled entitled to full faith and credit by a court of a sister state?

3. Is a divorce decree obtained without compliance with the minimum residence requirements on the part of the plaintiff entitled to full faith and credit by a court of a sister state?

4. Whether due process requires that no other jurisdiction shall give effect, even as a matter of comity, to an invalid judgment elsewhere acquired?

SUMMARY OF ARGUMENT

POINT A

Due process of law requires that the Supreme Court adhere to the principles of law enunciated in the case of *Haddock* v. *Haddock* and refuse to follow the principle of law in the case of *Williams* v. *North Carolina* (first Williams case).

POINT B

The Court below erred in holding that the respondent had acquired a domicile in Nevada and that therefore the Nevada courts had jurisdiction to grant a divorce.

POINT A

Due process of law requires that the Supreme Court adhere to the principles of law enunciated in the case of *Haddock* v. *Haddock* and refuse to follow the principle of law in the case of *Williams* v. *North Carolina* (first Williams case).

The Court below held that the jurisdiction of the State of Nevada to grant the divorce depended upon the respondent having acquired a domicile in Nevada and cited, in support of this ruling, *Bell* v. *Bell,* 181 U. S. 175, and *Williams* v. *North Carolina,* 325 U. S. 226.

It appears, however, that the case of *Bell* v. *Bell, supra,* was decided under the former principle enunciated by this Honorable Court in the case of *Haddock* v. *Haddock,* 201 U. S. 562, 26 Sup. Ct. 1905. In the case of *Bell* v. *Bell, supra,* as well as in the case of *Haddock* v. *Haddock, supra,* this Honorable Court held that no valid divorce can be decreed on constructive service.

It is uncontested that the petitioner in the instant proceeding was served by constructive service and that the so-called personal service outside of the State of Nevada, to wit, in the Commonwealth of Massachusetts, was nothing else but constructive service.

It is true, however, that this Honorable Court has reversed the rule in the case of *Haddock* v. *Haddock, supra,* which had been law for almost forty years, in the case of *Williams* v. *North Carolina,* 317 U. S. 287. However, in view of the increasing confusion and uncertainty with respect to foreign divorces which has resulted from the

decision in the *Williams* case, *supra,* this Honorable Court is most respectfully urged to reconsider the rule laid down in the first *Williams* case, *supra,* and reinstate the former rule of *Haddock* v. *Haddock, supra.*

In view of the increasing criticism of the inequities and the deprivation of due process, resulting from the decision in the first *Williams* case, *supra,* as best expressed in the dissenting opinion of Justice Jackson in the case of *Rice* v. *Rice,* 69 Sup. Ct. 751, in which Justices Black, Douglas and Rutledge joined, it is time for this urgent question to be revaluated in the light of the anomalous situation which has arisen with respect to foreign divorces in the past few years. As Justice Jackson states in the dissenting opinion of *Rice* v. *Rice, supra,* at page 753:

> "This Court, while acknowledging that personal service of process on the defendant ordinarily is necessary to a valid judgment in a personal action, held in the first Williams case that a state could bring a nonresident defendant within its power merely by publication or out-of-state service of its summons. It overruled former decisions to introduce what it has aptly characterized in Sherrer v. Sherrer, 334 U. S. 343, 349, and 356, 68 S. Ct. 1087, 1090, note 11, and 1097, as the 'ex parte divorce.' To me ex parte divorce is a concept as perverse and unrealistic as an ex parte marriage. The vice of the system sanctioned in Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A.L.R. 1273, is that one of the parties may leave the state where both for years have made their home, seek a forum of his choice, and pretty much on his own terms alter the pattern of two lives without affording the other even a decent chance to be heard—as this case illustrates.

> Lillian either had to leave her teaching and means of support to follow her husband two thousand miles from any place where she ever had lived, or let her marriage go by default. If she chose to follow and contest under Nevada law, she had little real chance to succeed. But this Court had called this due process of law for Lillian."

So in the instant case, the lower Court, following the rule laid down in the first *Williams* case, *supra,* called this due process of law for Rose.

The writer is of the opinion that the facts in the instant case indicate the extremes to which a spouse seeking his freedom may go in establishing a fictitious residence for the purpose of obtaining his freedom. The respondent herein became almost a professional itinerant in the course of "shopping around" for a jurisdiction suitable for his purpose and even when he found the jurisdiction which he considered desirable he failed to comply with the minimum jurisdictional requirements of residence in that jurisdiction, as will be fully discussed in the next point.

Since under the rule laid down in the first *Williams* case the domicile on the part of the plaintiff in Nevada is sufficient to confer jurisdiction on the Nevada courts, it becomes easy for one spouse to create a fictitious domicile in Nevada and obtain a divorce without the knowledge of the other spouse.

The rule laid down in the first *Williams* case although, technically, seemingly protects the rights of a defendant, a divorce suit instituted by the constructive service of process does not, in practice, protect a defendant because a plaintiff seeking a divorce upon grounds not recognized

in the state in which the defendant resides, and in which the plaintiff formerly resided, will practice fraud upon the defendant by presumingly establishing a residence in another state for the purpose of instituting such divorce by constructive service. This situation can only result in place upon the spouse, who is usually innocent in the situation, the burden of retaining counsel in a foreign state in endeavoring to contest the jurisdiction of the court by reason of the fictitious domicile. In practice, experience has demonstrated that such contest is always decided against the defendant.

It seems intolerable that the rule of law enunciated in the first *Williams* case should be continued when it does appear that the observance of that rule creates injustices which are irremedial.

POINT B

The Court below erred in holding that the respondent had acquired a domicile in Nevada and that, therefore, Nevada courts had jurisdiction to grant the divorce.

It is argued under Point A that the decree of divorce obtained by the respondent in Nevada is invalid since the petitioner herein was served by constructive service and such a service does not comply with due process, in accordance with the sound law expressed by this Court in *Haddock* v. *Haddock, supra.*

Assuming, however, that the constructive service on the petitioner herein would be due process, under the rule laid

down in the first *Williams* case, *supra,* the Reno decree would still be invalid under the rule laid down in the second *Williams* case, to wit, *Williams* v. *North Carolina,* 325 U. S. 226, 65 Sup. Ct. 1092. This is so because the respondent had not acquired domicile in Nevada and did not even comply with the minimum residential requirement, to wit, the six-week residence in the State of Nevada, before commencing his suit for divorce. As this Court in the second *Williams* case, cited *supra,* stated at page 1095:

> "*Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile.* Bell v. Bell, 181 U. S. 175, 21 S. Ct. 551, 45 L. Ed. 804; Andrews v. Andrews, 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicile implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicile of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted." (Italics writer's)

Although the Courts below found that the respondent had acquired domicile in Nevada, petitioner is nevertheless entitled to a review of this question by this Honorable Court. The finding is not, in reality, a finding of fact but a conclusion as to the jurisdiction of the Nevada courts. As this Court further stated in the second *Williams* case, *supra,* at page 1098:

> "State courts cannot avoid review by this Court of their disposition of a constitutional claim by cast-

> ing it in the form of an unreviewable finding of fact. Norris v. Alabama, 294 U. S. 587, 590, 55 S. Ct. 579, 580, 79 L. Ed. 1074."

The Courts below have accorded full faith and credit to the decree obtained by the respondent in Nevada in spite of the fact that the respondent had not acquired domicile in Nevada and did not even comply with the jurisdictional minimum requirements of said state. Such a decree is not entitled to full faith and credit and should not have been given effect even as a matter of comity. As this Honorable Court stated in *Griffin* v. *Griffin*, 327 U. S. 220, 66 Sup. Ct. 556, at page 560:

> "A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. National Exchange Bank v. Wiley, 195 U. S. 257, 25 S. Ct. 70, 47 L. Ed. 184; Old Wayne Life Ass'n v. McDonough, 204 U. S. 8, 23, 27 S. Ct. 236, 241, 51 L. Ed. 345; Baker v. Baker, Eccles & Co., 242 U. S. 394, 401, 37 S. Ct. 152, 154, 61 L. Ed. 386. Moreover, due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process. Restatement of Judgments, Sec. 11, Comment (c)."

A perusal of the record in the instant case shows that the respondent had never acquired domicile in Nevada but was a traveller seeking a divorce haven. On October 5, 1934, he filed a divorce action in Mexico, without the knowledge of petitioner, and obtained a divorce decree in that country which is, of course, invalid (R. 11). In 1938 he filed a divorce action in Florida, which was abandoned by

him (R. 41). In 1941 the respondent brought the action for divorce in Nevada and obtained a divorce decree, the validity of which is the issue involved in this proceeding.

During a period of seven years the respondent endeavored three times to obtain a divorce from his wife, without her participation in any one of the proceedings, and finally, at the end of seven years, succeeded in obtaining the divorce which is the subject of this proceeding. The two unsuccessful attempts on the part of the respondent to obtain a legal divorce—in Mexico and in Florida—prove conclusively that the domicile acquired by the respondent in Nevada was fictitious and was acquired for the sole purpose of obtaining a divorce in that state. To hold otherwise would be to close one's eyes to the true facts in the proceeding and the fraudulent intention of this respondent.

The record is replete with the respondent's own statements and evidence that while he was in Reno he still had his domicile either in Florida or Massachusetts. The fact is that the residence of the respondent in Reno immediately prior to the commencement of the divorce action by him was not more than two weeks, whereas the Nevada statute requires a minimum residence of six weeks. The Court below erred in adding to said period of residence of two weeks a previous residence which the respondent had in Nevada in the year 1940 since the record is barren of any credible evidence that the respondent at said time had intended to establish his domicile in Nevada.

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise by this Court of its advisory powers and that to such end a Writ of Certiorari be granted and this Court review the decisions of the Courts below and finally reverse it.

Respectfully submitted,

ARCHIBALD PALMER
Attorney for Petitioner
320 Broadway
New York, N. Y.